

IN THE SUPREME COURT OF MISSISSIPPI

DAVE C. TERRY

APPELLANT

VS.

CASE NO. 2010-SA-00980

OFFICE OF THE GOVERNOR
MISSISSIPPI DIVISION OF MEDICAID

APPELLEE

ON APPEAL FROM THE HINDS COUNTY CIRCUIT COURT

BRIEF OF THE APPELLEE
(Oral Argument Not Requested)

ATTORNEYS FOR THE APPELLEE

Charles P. Quarterman
MSB # [REDACTED]
Special Assistant Attorney General
Chief Counsel for the Division of Medicaid

Nicole G. Litton
MSB # [REDACTED]
Special Assistant Attorney General
Counsel for the Division of Medicaid

550 High Street
Walter Sillers Building, Suite 1000
Jackson, MS 39201
Telephone: (601) 359-6814
Facsimile: (601) 949-9620

TABLE OF CONTENTS

	<u>Page</u>
Table of Contents	ii
Table of Cases and Authorities	iii
Statement of the Issues	v
Statement of the Case and Facts	1
Summary of the Argument	4
Standard of Review	6
Argument	6
Conclusion	21
Certificate of Service	23

TABLE OF CASES AND AUTHORITIES

STATE CASES

	<u>Page</u>
<i>Bowie v. Montfort Jones Memorial Hospital</i> , 861 So.2d 1037.....	13
<i>Busick v. St. John</i> , 856 So.2d 304 (Miss. 2003).....	13
<i>City of Jackson v. Internal Engine Parts Group, Inc.</i> , 903 So.2d 60 (Miss. 2005).....	13
<i>Edwards v. State</i> , 823 So.2d 1223.....	15
<i>Ekornes-Duncan v. Rankin Medical Center</i> , 808 So.2d 955 (Miss. 2002).....	13
<i>Employees' Retirement System v. Marquez</i> , 774 So.2d 421 (Miss. 2000).....	8
<i>Flowers v. Mississippi Dept. of Human Services</i> , 764 So.2d 493 (Miss. App. 2000) 8, 14,17,18	
<i>Haggerty v. Foster</i> , 838 So.2d 948.....	16
<i>Hammers v. Hammers</i> , 890 So.2d 944 (Miss. Ct. App. 2004).....	13
<i>Harris v. Shields</i> , 568 So.2d 269 (Miss. 1990).....	15, 16
<i>Hood v. Miss. Dept. of Wildlife Conservation</i> , 571 So.2d 263 (Miss. 1990).....	10,11
<i>Hurns v. Miss. Dept. of Corrections</i> , 878 So.2d 223 (Miss. Ct. App.2004).....	18
<i>Lloyd v. State</i> , 755 So.2d 12 (Miss. Ct. App. 1999).....	15
<i>Miss. Dept. of Corrections v. Maxwell</i> , 913 So.2d 1013 (Miss. 2005).....	6, 8
<i>Mississippi State Dept. of Health v. Natchez Comm. Hospital</i> , 743 So.2d 973 (Miss. 1999).....	7
<i>Miss. Transportation Comm'n v. Anson</i> , 879 So.2d 958 (Miss. 2004).....	8,9
<i>Newell v. State</i> , 754 So.2d 1261 (Miss. 1999).....	9
<i>Redhead v. Entergy Mississippi, Inc.</i> , 828 So.2d 801 (Miss. Ct. App. 2002).....	15
<i>Richardson v. APAC-Mississippi, Inc.</i> , 631 So.2d 143 (Miss. 1994).....	13
<i>Richmond v. Miss. Dept. of Human Services</i> , 745 So.2d 254 (Miss. 1999).....	6

<i>Triplett v. City of Vicksburg</i> , 758 So.2d 399 (Miss. 2000).....	18
<i>Tucker v. Priscock</i> , 791 So.2d 190 (Miss. 2001).....	8
<i>Wilburn v. Miss. Highway Safety Patrol</i> , 795 So.2d 575 (Miss. Ct. App. 2001).....	9
<i>Young v. North Miss. Medical Center</i> , 783 So.2d 661 (Miss. 2001).....	18

FEDERAL STATUTES

42 U.S.C. 2000e-2.....	19
------------------------	----

STATE STATUTES

<i>Miss. Code Ann.</i> Section 25-9-132.....	16,17,18
<i>Miss. Code Ann.</i> Section 97-3-7 (1) (c).....	7
<i>Miss. Code Ann.</i> Section 97-3-107.....	7
<i>Miss. Code Ann.</i> Section 99-19-71.....	10

STATEMENT OF THE ISSUES

1. Whether Medicaid's decision to terminate Dave C. Terry was supported by substantial evidence and was not arbitrary or capricious.
2. Whether Terry's due process rights were violated by the Hearing Officer's application of the Employee Appeals Board's procedural rules to strike the witnesses of both parties due to untimely filing of the parties' witness lists.
3. Whether Terry, a white male, may raise a claim of gender discrimination for the first time in his appeal to this Court, and if so, whether Terry proved that he was terminated because of his gender.

STATEMENT OF THE CASE AND FACTS

The Appellant, Dave C. Terry, a white male employed by the Division of Medicaid in its Brandon, Mississippi office as a Medicaid Specialist II (Record, Volume 3, p. 15) was convicted on July 22, 2004, by the Rankin County Court of one count of stalking and one count of simple assault (Record, Exhibit "1"). Testimony in the record of the Employee Appeals Board hearing indicates that Terry had prior disciplinary actions, but the specifics of these disciplinary actions were not put into evidence by either party, although both parties had possession of Terry's personnel file (Record, Volume 3, pp. 13, 14). Medicaid provided Terry with a pre-termination conference on August 18, 2004, before the Executive Director's designee (Record, Volume 3, p. 19). On August 31, Terry was notified by letter from Executive Director Warren Jones, M.D., that the final decision of the agency was to terminate his employment. This determination was based upon his criminal conviction, a Group III Offense for which an employee may be dismissed pursuant to the Mississippi State Personnel Board regulations (Record, Exhibit 4).

Terry filed a Notice of Appeal with the Mississippi Employee Appeals Board ("EAB") on September 13, 2004 (Record, Volume 1, p. 10). On November 16, 2004, Medicaid submitted its witness list prior to the first hearing date, November 23, 2004 (Record, Volume 3, page 5). Terry did not submit a witness list until over five months after Medicaid filed its witness list and later than ten (10) days before the third and final hearing date of May 12, 2005 (Record, Volume 1, page 12). On May 2, 2005, well after Medicaid's termination decision based on the conviction had been made, Terry obtained an Order of Expungement, but this order was not introduced into evidence at the EAB hearing.

At a pre-hearing, telephonic conference held May 10, 2005, the Hearing Officer granted Terry access to his personnel file (Record, Volume 2, page 22) and required Medicaid to produce

a list of employees against whom similar disciplinary actions had been taken dating back to January 2003 (Record, Volume 2, pages 23, 24). When asked by the Hearing Officer, Terry specifically declined to obtain the gender of these employees (Record, Volume 2, page 24, lines 6-11).

At this same conference, the Hearing Officer struck Terry's witness list as untimely filed upon motion of Medicaid (Record, Volume 2, pp. 24, 25). The Hearing Officer took Terry's Motion in Limine to exclude the Judgment of Conviction and Terry's Motion for Summary Judgment under advisement (Record, Volume 2, pages 22 and 26).

At the hearing, the Hearing Officer denied Terry's Motion in Limine (Record, Volume 3, page 5). Upon Terry's motion (Record, Volume 3, pages 5-7), the Hearing Officer also struck all the witnesses of Medicaid as untimely filed. The Hearing Officer allowed the agency representative, an official of Medicaid's personnel department, to testify (Record, Volume 3, page 6, lines 12-23), and he allowed Terry to testify (Record, Volume 3, page 54, lines 14-16). However, Terry chose not to testify and did not present any evidence or exhibits at the hearing (Record, Volume 3, page 55, lines 23-24). This meant that the Order of Expungement was never actually introduced into evidence.

The agency representative testified that Terry had been given all due process rights required by the State Personnel Board regulations for a permanent state service employee (Record, Exhibit "2"). Medicaid presented evidence that Terry was dismissed because of his criminal conviction (Record, Volume 2, pages 11, 17; Exhibit "4"). The Judgment of Conviction was entered into evidence (Exhibit "1"). Terry declined to testify, offered no evidence or Offer of Proof and rested (Record, Volume 3, page. 55).

After consideration of the evidence presented, the Hearing Officer entered an Opinion and Order upholding Medicaid's termination of Terry's employment as being proper and in order

(Record, Volume 1, page 11). Upon Terry's request for review, the EAB issued an Order affirming the Hearing Officer's decision (Record , Volume 1, page 11).

On November 3, 2005, Terry filed his Notice of Appeal with the Circuit Court of Hinds County, Mississippi. On September 8, 2008, Circuit Judge Tomie T. Green entered her Memorandum Opinion and Order in this matter, in which she affirmed the EAB's decision upholding Medicaid's action of terminating Terry's employment (Record, Volume 1, page 10). Terry thereafter appealed Judge Green's decision to this Court.

SUMMARY OF THE ARGUMENT

1. MEDICAID'S DECISION, AS AFFIRMED BY THE EMPLOYEE APPEALS BOARD AND THE CIRCUIT COURT, WAS SUPPORTED BY SUBSTANTIAL EVIDENCE AND WAS NOT ARBITRARY OR CAPRICIOUS.

The Circuit Court's Order that affirmed the EAB's order and Medicaid's action should be affirmed. Terry was convicted of one count of stalking and one count of simple assault by the Rankin County Court while employed by Medicaid. This constitutes a Group III, Section 10 Offense for which an employee may be dismissed pursuant to the Mississippi State Personnel Board (SPB) regulations. Because the discipline imposed was authorized by the SPB regulations, Medicaid's decision cannot be considered "arbitrary" or "capricious."

Also, Medicaid's decision to terminate Terry's employment was based on the Judgment of Conviction, which constitutes "substantial evidence." Although the Hearing Officer invited Terry to testify, Terry declined and never rebutted this evidence by testimony or exhibits; he failed to sustain his required burden of proof.

Moreover, the Hearing Officer correctly ruled, consistent with Mississippi Supreme Court precedent, that any expungement order obtained by Terry after Medicaid's decision to terminate is irrelevant to the question whether that decision was arbitrary, capricious, or unsupported by substantial evidence. Instead, it is Medicaid's action under the facts as they existed at the date of termination that must be considered by this Court on review.

2. TERRY'S DUE PROCESS RIGHTS WERE NOT VIOLATED IN THE EMPLOYEE APPEALS BOARD HEARING.

The Hearing Officer struck both Terry's witness list and Medicaid's witness list as untimely filed. Indeed, Medicaid's witness list was struck upon motion by Terry, who cannot now complain of the rule's unfairness to him. It is proper and routine for judges and hearing

officers entrusted with the management of trials to strike witnesses and evidence for violation of procedural rules such as untimely filing. No lengthy discovery is contemplated in the administrative hearings of the EAB. The EAB rules anticipate the simultaneous exchange of witness lists. Terry's belated witness list violated these rules.

In the alternative, if the striking of witnesses was error, it was harmless. Terry made no Offer of Proof of the substance of the witnesses' testimony; therefore, neither the Hearing Officer nor this Court have information to determine if a substantial right was violated. What information was provided on the witness list consists of conclusory statements with no facts or relevant information to show that the exclusion of the witnesses would violate a substantial right of Terry. In fact, Terry himself could have testified to much of the information he says these witnesses could have offered; but he chose not to testify. Thus, Terry put nothing into evidence by way of his own testimony or exhibits to counter the testimony or exhibits entered through the agency representative.

3. THERE WAS NO CLAIM OF GENDER DISCRIMINATION IN THE EMPLOYEE APPEALS BOARD AND, IN ANY EVENT, THERE IS NO EVIDENCE OF GENDER DISCRIMINATION.

Terry did not raise the issue of gender discrimination at any point before Medicaid or in the EAB process and thus cannot raise the issue for the first time on appeal. In fact, Terry declined to obtain evidence on this very issue in a pre-hearing argument. In any event, there is absolutely no evidence that Terry was dismissed because of his gender. The record is devoid of any reference to this issue. The evidence in the record is clear that the reason for Terry's dismissal was his criminal conviction in the Rankin County Court.

ARGUMENT

STANDARD OF REVIEW

1. MEDICAID'S DECISION, AS AFFIRMED BY THE EMPLOYEE APPEALS BOARD AND THE CIRCUIT COURT, WAS SUPPORTED BY SUBSTANTIAL EVIDENCE AND WAS NOT ARBITRARY OR CAPRICIOUS.

The standard of review of an administrative agency's findings and decisions is well-established by the Mississippi Supreme Court. "An agency's conclusions must remain undisturbed unless the agency's order 1) is not supported by substantial evidence, 2) is arbitrary or capricious, 3) is beyond the scope or power granted to the agency, or 4) violates one's constitutional rights. A rebuttable presumption exists in favor of the administrative agency, and the challenging party has the burden of proving otherwise." *Mississippi Dept. of Corrections v. Maxwell*, 913 So.2d 1013, 1015 (Miss. 2005). The Court established that "the statute and administrative regulations clearly place the burden of persuasion on the aggrieved Employee to demonstrate that the reasons given are not true. . . . Unless the employee carries the burden of persuasion that the alleged conduct did not occur, the employee has no right to have the employment decision overturned." *Id.*, citing *Richmond v. Miss. Dep't of Human Services*, 745 So.2d 254, 258 (Miss. 1999).

a) TERMINATING AN EMPLOYEE FOR COMMITTING A CRIME IS NOT ARBITRARY AND CAPRICIOUS.

The Mississippi Supreme Court has defined the terms "arbitrary" and "capricious" in relation to an Employee Appeals Board or agency ruling. Medicaid's decision is arbitrary "when it is not done according to reason and judgment, but depending on the will alone." The agency decision is capricious "if done without reason, in a whimsical manner, implying either a lack of

understanding of or disregard for the surrounding facts and settled controlling principles.” *Maxwell*, at 1015, citing *Mississippi State Dep’t of Health v. Natchez Comm. Hospital*, 743 So.2d 973, 977 (Miss. 1999).

Medicaid’s decision to terminate Terry because of his criminal conviction was not arbitrary and capricious under these definitions. The State Personnel Board rules establish three groups of offenses. Group III Offenses are considered the most serious in nature. Commission of one Group III offense may be disciplined by dismissal. Terry was discharged for violation of subsection 10:

Criminal conviction for a felony or misdemeanor while employed. A plea or verdict of guilty, or a conviction following a plea of nolo contendere, to a charge of a felony or a misdemeanor is deemed to be a conviction within the meaning of this offense.

(Record, Volume 3, page 11, lines 4-12; page 18, lines 4-8).

The record in this case shows that a Judgment of Conviction was entered against Terry, finding him guilty of one count of Stalking in violation of *Miss. Code Ann.* Section 97-3-107 and of one count of Simple Assault in violation of *Miss. Code Ann.* Section 97-3-7(1)(c). The Judgment was entered in the County Court of Rankin County on July 22, 2004. (Record, Volume 3, page 13, Exhibit “1”). Medicaid accorded Terry due process with notice and a pre-termination hearing (Record, Volume 3, pages 18, lines 22-25; page 19, lines 1-21; Exhibit “3”). The final decision to terminate Terry’s employment was evidenced by the Termination Letter dated August 31, 2004 (Exhibit “4”).

The Circuit Court’s and EAB’s decisions to uphold Medicaid’s decision to terminate Terry’s employment on August 31, 2004, were based upon Terry’s criminal conviction dated July 22, 2004. Such a conviction is a Group III violation for which an employee may be dismissed under the State Personnel Board rules. There is nothing arbitrary or capricious about

such a decision. *Flowers v. Miss. Dept. of Human Services*, 764 So.2d 493, 496 (Miss. App. 2000) (holding that termination is proper for a Group III Offense).

- b) THE EVIDENCE THAT TERRY COMMITTED A CRIME WAS UNREBUTTED; THUS, MEDICAID'S DECISION WAS SUPPORTED BY SUBSTANTIAL EVIDENCE.

The decision to dismiss this employee is clearly based on substantial evidence: the Judgment of Conviction for stalking and simple assault. In *Mississippi Transportation Comm'n v. Anson*, 879 So.2d 958, 963 (Miss. 2004), the Court established that "substantial evidence" in an Employee Appeals Board Hearing is "evidence that a reasonable person would accept as adequate to support a conclusion." *Id.*, citing *Tucker v. Priscock*, 791 So.2d 190, 192 (Miss. 2001). Substantial evidence is "something more than a 'mere scintilla' or suspicion." *Id.*, citing *Employees' Retirement Sys. V. Marquez*, 774 So.2d 421, 425 (Miss. 2000). In this case, there was substantial evidence by way of testimony of Medicaid's representative and exhibits entered into the record before the Hearing Officer. This evidence supports the conclusion that Terry had been convicted of a crime at the time of his termination and that was the reason for his termination.

Moreover, Terry had the ultimate burden of proof in this proceeding, once Medicaid introduced evidence of the reason for his dismissal. *Maxwell*, at 1015. However, Terry failed to carry his burden of proof; in fact, he offered no evidence at all. Terry's Motion in Limine to prevent the introduction of the July 22, 2004, Judgment of Conviction was properly overruled by the Hearing Officer (Record, Volume 3, page 5, line 2); and Terry did not challenge this ruling on appeal to the Circuit Court. Thus, the evidence that Terry committed a crime is unrebutted. In addition, Terry failed to put into evidence the Order Granting Motion for Expungement dated May 2, 2005, upon which he placed such reliance. Furthermore, even with a stipulation that

Terry would deny the criminal conviction, Terry chose not to testify at the hearing. Accordingly, Terry rested without offering any evidence whatsoever in contravention of Medicaid's actions. (Record, Volume 3, page 55, lines 17-24).

Terry did not sustain his required burden of proof. Medicaid followed the published rules and regulations of the State Personnel Board, and the discipline imposed on Terry was allowed by the SPB guidelines; thus, the decision of the EAB should be upheld. *Mississippi Transportation Comm'n v. Anson*, 879 So.2d 958, 962 (Miss. 2004); *Wilburn v. Mississippi Highway Safety Patrol*, 795 So.2d 575, 577 (Miss. Ct. App. 2001).

- c) THE EXPUNGEMENT DID NOT CHANGE MEDICAID'S DECISION, IN THAT AN EXPUNGEMENT DOES NOT INVALIDATE THE ORIGINAL FINDINGS OF FACT AND CONCLUSIONS OF LAW; ALSO, THE EXPUNGEMENT OCCURRED AFTER THE TERMINATION.

Terry was convicted on July 22, 2004, of simple assault and stalking (Record, Exhibit "1"). Terry was suspended with pay pending his pre-termination, due process conference. Once the conference was held, the Executive Director of Medicaid, Dr. Warren Jones, decided to terminate Terry. This was, of course, based on the information that Dr. Jones had before him at that time, August 31, 2004 (Record, Exhibit "4"). These facts are all that is required by the State Personnel Board, the Circuit Court and this Court in order to sustain an employee termination. After Terry appealed Medicaid's decision to the EAB, he then twice successfully moved to have his hearing continued while completing the terms of his probation. The expungement was granted on May 2, 2005, ten days prior to the EAB's third hearing date, on May 12, 2005.

Terry should not now be allowed to argue this point not in evidence before the Court. Indeed, the Supreme Court does not allow appellants to make legal arguments unsupported by authority. *Newell v. State*, 754 So.2d 1261 (Miss. 1999). This Court need not, therefore, decide if the expungement would be relevant in this context.

Miss. Code Ann. Section 99-19-71 (as amended) provides that any person who is a first offender and was convicted of a misdemeanor may petition the court for an order to expunge the conviction from all public records. The effect of an expungement order is to restore such person to the legal status he occupied before his arrest. It does not mean the underlying criminal conduct did not happen.

It is nowhere contemplated that an Order of Expungement acts to restore such person to his job. Such a proposition defies the logic of experience. It would mean that an event that once occurred in time and space is wiped out, and any consequences of those acts occurring at that time are nullified. Judge Green clearly recognized that concept, when she ruled:

The Court further opines that Mr. Terry's expungement of his criminal record in no way changes or invalidates the charges for which he was convicted. Although Terry claims that his record had been expunged by the time of the May 12, 2005 hearing, the court notes several months of continuance of the pretermination hearing to effectuate said expungements.

(Record, Volume 1, page 14).

The Circuit Court's refusal to recognize the expungement order follows exactly the rationale of this Court in considering an analogous situation in *Hood v. Mississippi Dept. of Wildlife Conservation*, 571 So.2d 263 (Miss. 1990). Hood had been convicted of vote fraud. He was terminated by the agency for a Group III violation—the same section on which Terry was terminated. On appeal, however, Hood's conviction was reversed. Hood then brought an action for injunction against the agency in chancery court. This Court then held that the Chancery action was barred, because Hood had not raised the appellate reversal of his conviction as an argument in the EAB procedure. But as an alternative ground for its holding, this Court squarely held that the reversal of Hood's conviction did not, in any event, require his reinstatement to his employment:

Hood points to nothing suggesting that our reversal of his criminal conviction would inexorably have led to his reinstatement with DWC. Hood's criminal conviction performed but an evidentiary function for the Employee Appeals Board. The underlying fraudulent conduct was the true grounds upon which the DWC discharged Hood. The criminal conviction served only to establish at the time that those grounds existed.

Id., at 269.

For the same reasons as this Court gave in *Hood*, the Order of Expungement was not intended to and cannot retroactively alter the facts upon which Medicaid's termination decision was made in August 2004. Like the DWC in *Hood*, Medicaid had sufficient justification *at the time of its decision* to terminate Terry because his criminal conviction proved that his conduct was a Group III offense meriting discharge. Medicaid should not be required to give an employee his job back because he completed his probation and got his record expunged.

2. TERRY'S DUE PROCESS RIGHTS WERE NOT VIOLATED IN THE EMPLOYEE APPEALS BOARD HEARING.

Terry argues that his due process rights were violated by the Hearing Officer's ruling that struck his Witness List and barred him from calling witnesses other than himself. The Hearing Officer struck *both* parties' witness lists---because Terry himself took advantage of the EAB rule he now claims is unfair. The first hearing date before the EAB Hearing Officer was set to commence on November 23, 2004 (Record, Volume 1, page 14). Nine days prior to that hearing date, Medicaid submitted its witness list (Record, Volume 2, page 5). Terry did not submit a witness list prior to that hearing date (Record, Volume 2, page 10, lines 10-11). On November 22, 2004, the day before the first hearing date, Terry requested and was granted a continuance (Record, Volume 1, page 12). The second hearing date was set for March 17, 2005 (Record, Volume 1, page 12). Terry did not submit a witness list prior to that hearing date. On March 16, 2005, the day before the second hearing, Terry again requested and was granted a continuance (Record, Volume 1, page 12). A third hearing date was set for May 12, 2005 (Record, Volume

1, page 12). On *the ninth* day before this *third* hearing date, Terry submitted a witness list (Record, Volume 1, page 14). The Hearing Officer struck both Terry's witness list (Record, Vol. 2, p. 24, lines 22-25, p. 25, lines 1-6) and Medicaid's witness list (Record, Vol. 3, p. 6, line 25, and p. 7, line 1) as untimely filed. Each party was allowed to call one witness: Medicaid's representative, an official within the Personnel Department, was allowed to testify as to Medicaid's position. Terry was allowed to testify but declined to do so (Record, Volume 3, page 55).

Even should the Court find that Terry had the right to file his witness list before the third setting of the hearing, he still failed to timely file that list. The EAB Administrative Rules, Rule 14, required that each party file his or its witness list *no later than* ten calendar days prior to the hearing date. Terry filed his list on May 2, 2005, and the hearing was on May 12, 2005. The "no later than" language of that rule requires that one exclude May 2 (the date of filing), and includes May 11 (the day before the hearing) in the calculation, which shows that Terry filed his list within *nine* days before the hearing, and the filing was therefore not made in a timely manner. Therefore, Judge Green was correct in her calculation. (Record, Volume 1, page 14).

Neither party was denied due process by the Hearing Officer. Terry cannot be heard to complain of a due process violation when he used the same rule he complains of to strike Medicaid's testimony, the same treatment was accorded Medicaid as was given Terry, and Terry took no action to present his case or preserve the proffered testimony of any witnesses.

a) **IT IS PROPER FOR A TRIBUNAL TO STRIKE WITNESSES AND EVIDENCE FOR VIOLATION OF PROCEDURAL RULES.**

It cannot be a violation of Due Process for a hearing officer to strike evidence as untimely designated prior to the hearing. In every case, trial judges and hearing officers must make daily decisions to exclude or include witnesses and evidence. They are charged with the day-to-day

management of myriad cases. Therefore, trial judges are accorded wide and considerable discretion in managing pre-trial processes, including discovery, scheduling orders and setting deadlines to assure orderly pre-trial preparation that will result in timely disposition of cases. *Bowie v. Montfort Jones Memorial Hospital*, 861 So.2d 1037, 1042 (Miss. 2003) (In medical malpractice action, Court upheld trial judge's entry of summary judgment against plaintiff, resulting from plaintiff's failure to timely designate expert witness). Similarly, it is routine for trial judges to exclude untimely filed witness lists and evidence. *City of Jackson v. Internal Engine Parts Group, Inc.*, 903 So.2d 60, 65 (Miss. 2005), citing *Busick v. St. John*, 856 So.2d 304, 319, 321 (Miss. 2003) (trial court was correct to exclude the testimony of city's newly added fact witnesses a year after due and within a week of trial). (See also *Hammers v. Hammers*, 890 So.2d 944, 956 (Miss. Ct. App. 2004) (trial court was not manifestly wrong in striking party's expert appraisal witness as untimely filed.)

Thus, when parties fail to comply with the orders of the trial judge, "they should be prepared to do so at their own peril." *Bowie*, at 1042. Even if the result is harsh, this Court will uphold a trial judge's ruling striking witnesses unless there is manifest error or abuse of discretion. *Ekornes-Duncan v. Rankin Medical Center*, 808 So.2d 955, 958, 959 (Miss. 2002) (trial court was correct in striking plaintiff's two expert witnesses untimely filed even if this ultimately led to summary judgment in favor of the hospital); *Richardson v. APAC-Mississippi, Inc.*, 631 So.2d 143, 146 (Miss. 1994), holding trial court was correct in striking plaintiff's three affidavits submitted after three continuances, which resulted in summary judgment for defendant).

If Terry's argument were the law, none of those cases would have been decided as they were by this Court or the Court of Appeals. To the contrary, however, it is obvious that it does not offend due process for the court or hearing officer to strike untimely designated testimony.

In this case, Terry argues that the EAB's procedural rules do not clearly state that the witness list must be submitted ten days before the *first* setting of the hearing on the appeal. However, the Hearing Officer's interpretation of the rule is the only one which makes sense. In the EAB procedure, there is no "give and take" discovery. Instead, there is a *simultaneous* exchange of witness lists. Under Terry's view, he could get Medicaid's witness list, move for a continuance, and then submit his own witness list months later, giving him a "free look" at his opponent's case before framing his own. That is not the procedure contemplated by the EAB. The Hearing Officer's ruling made perfect sense, given a correct reading of the rules.

Moreover, Terry himself made use of the rule. He moved to strike Medicaid's witnesses, and The Hearing Officer granted his motion. Having profited from the rule applied by the Hearing Officer, Terry can hardly contend that the rule itself was unfair.

Terry cites *Flowers, supra*, in his Appellant's Brief to this Court (Appellant's Brief, page 7) for the proposition that Terry should have the right to call any witnesses he wants (apparently in contravention of the EAB Administrative Rules). The Court of Appeals noted that Ms. Flowers, a terminated employee, was given the rights of a pre-termination written notice, a pre-termination conference and to bring any witnesses she would find helpful to her EAB hearing. However, there was no evidence that Ms. Flowers failed to timely file her witness list. That fact distinguishes Terry's case from *Flowers* on that particular point.

For these reasons, the Hearing Officer's ruling striking Terry's witness did not violate his due process rights.

- b) TERRY FAILED TO MAKE AN OFFER OF PROOF AS TO HIS WITNESSES. THEREFORE, HE WAIVED THE OBJECTION. HOWEVER, IF THE EXCLUSION OF TERRY'S WITNESS LIST WAS ERROR, THE RULING OF THE HEARING OFFICER WAS HARMLESS, AND NO SUBSTANTIAL RIGHT OF TERRY WAS AFFECTED.

In Judge Green's Memorandum Opinion and Order, she notes that "Mr. Terry provides no alleged testimony by witnesses on his proposed list that would exonerate him of the Group III-Rankin County convictions." (Record, Volume 1, page 14). Terry's counsel failed or refused to make any Offer of Proof of Terry's proposed witnesses, which means that Terry has no basis on which to argue that his due process rights were violated by the exclusion of the witness list. The Court of Appeals has ruled that:

When a trial court prevents the introduction of certain evidence, it is incumbent on the offering party to make a proffer of the potential testimony of the witness or the point is waived for appellate review.

Redhead v. Entergy Mississippi, Inc., 828 So.2d 801, 808 (Miss. Ct. App. 2002), *citing* Lloyd v. State, 755 So.2d 12 (Miss. Ct. App. 1999). *See also* Edwards v. State, 823 So.2d 1223, 1228 (Miss. Ct. App. 2002).

But in this case, the record is devoid of any offer of proof as to the substance of Terry's witnesses' testimony. No offer of proof was made in the telephonic hearing held on May 10, 2005. No offer of proof appears in the Hearing transcript of May 12, 2005. No continuing objection was made. Therefore, this Court has no substantive information upon which to base an opinion that the denial of these witnesses' testimonies prejudiced Terry. On this ground alone, this Court can reject Terry's due process argument.

In the alternative only, if the Court considers that there were a sufficient Offer of Proof, the next inquiry is whether or not Terry has proved that the error, if there be one in excluding these witnesses, makes a difference in the outcome of the case. Terry's chief theories of the case

did not attempt to challenge the fact that he had been found guilty of those two Group III Offenses at the time of the termination of employment, nor did those theories assert that the expungement order predated Medicaid's termination of Terry's employment. Therefore, one can logically assume that none of Terry's witnesses would refute Medicaid's key reasons for termination. *Assuming arguendo* that the Hearing Officer's ruling to exclude Terry's witness list was error, it should be considered harmless error.

In *Harris v. Shields*, 568 So.2d 269, 272 (Miss. 1990), Plaintiff brought a malpractice suit against a dental surgeon for the death of a patient. The Court considered whether the trial court's exclusion of plaintiff's expert, which resulted in a directed verdict for the defendant, was error.

The Court stated that:

The point is of importance for, even if we consider that the Court below erred and that it should have allowed Dr. Gerughty to express his opinion on causation, we may not reverse unless we find that this opinion augments plaintiff's proof such that plaintiff should probably survive a defense motion for a directed verdict. Otherwise, exclusion of . . . testimony may not be said to have 'affected. . . a substantial right of plaintiff. *Id.*

In *Harris*, the proffered testimony indicated that had the defendant taken the patient's blood pressure prior to administering the anesthetic, the patient would not have suffered a cerebral hemorrhage and died. The Court held that there was nothing in the proffer of the record that showed that had the defendant taken the patient's blood pressure as Dr. Gerughty suggested, that there was a reasonable probability that she would not have died. Thus, the verdict was affirmed. *Id.* at 274, 276.

Harris shows that the exclusion is harmless where the testimony would not have assisted the party offering it to prove the claim or defense. See also *Haggerty v. Foster*, 838 So.2d 948 (Miss. Ct. App. 2003).

Likewise, *Miss. Code Ann.* Section 25-9-132(3) provides:

No relief will be granted based upon the court's finding of harmless error by the board in complying with the procedural requirements of Sections 25-9-127 through 25-9-129; provided, however, in the event that there is a finding of prejudicial error in the proceedings, the cause may be remanded for a rehearing consistent with the findings of the court.

Considering the facts of this case and the authorities cited above, if any error occurred, it was harmless error and did not adversely affect any substantial right of Terry.

c) **TERRY HIMSELF DID NOT TESTIFY.**

Terry was offered the opportunity to testify at his hearing. He chose not to testify and rested his case without putting into evidence any document or giving any testimony whatsoever—not even the record of the expungement of his conviction or the circumstances of the underlying events that led to the conviction. Furthermore, even though he had Medicaid's personnel file, Terry's lawyer below did not use it to cross-examine Medicaid's witness, or to introduce it into evidence. He abdicated his case when he chose not to rebut the testimony of Medicaid's witness or Medicaid's exhibits placed into evidence. He should not now be allowed to appeal the consequences of his own decision taken at his hearing before the EAB.

3. THERE WAS NO CLAIM OF GENDER DISCRIMINATION IN THE EMPLOYEE APPEALS BOARD AND, IN ANY EVENT, THERE IS NO EVIDENCE OF GENDER DISCRIMINATION.

a) **TERRY DID NOT CHALLENGE HIS DISMISSAL ON GROUNDS OF GENDER DISCRIMINATION AND CANNOT RAISE THE ISSUE FOR THE FIRST TIME ON THIS APPEAL.**

In his brief to the Circuit Court, Terry, for the first time in this case, raised the issue of gender discrimination, alleging that he was terminated because he was a male. Pursuant to *Miss. Code Ann.* Section 25-9-132(2), the scope of review of the Circuit Court in EAB cases is limited to a review of the record made before the EAB or Hearing Officer to determine if the action of

the EAB is unlawful. There is nothing in the record of this appeal, either at the EAB hearing or in the appeal to the full EAB, where Terry challenged his termination on grounds of gender discrimination. Neither the Hearing Officer nor the full EAB was presented with this issue and afforded the opportunity to decide it. Medicaid was not given any opportunity to rebut this charge. Terry's claim of gender discrimination is therefore barred under the plain terms of Section 25-9-132(2).

Terry actually denied that gender was relevant to the EAB hearing. In a pre-hearing conference on subpoenas for information from Medicaid, Hearing Officer Daniels asked Terry's counsel: "...and I'm not sure if sex or gender of the individual is important?" Terry's then-counsel answered, "It's not, Your Honor." (Record, Vol. 2, page 24, lines 8-11).

In *Flowers v. Miss. Dept. of Human Services*, 764 So.2d 493, 495, 496 (Miss. Ct. App. 2000), the Court of Appeals was asked to consider whether the discipline imposed on a state employee was disproportionate to the offense; however, the employee had not challenged his discipline on that basis prior to the appeal. The Court of Appeals refused to consider this issue, noting that "the Supreme Court will not consider matters raised for the first time on appeal." *Id.*, at 495, citing *Triplett v. City of Vicksburg*, 758 So.2d 399 (Miss. 2000). The Court of Appeals explained that this rule is designed "to avoid finding that a trial judge erred when the matter was not presented to that court for decision." *Id.*, at 495, 496.

Similarly, in *Young v. North Miss. Medical Center*, 783 So.2d 661, 664 (Miss. 2001), this Court held that when a former nurse failed to plead in lower court the issues of constructive discharge and retaliation for reporting acts of co-workers, the Court would not hear or decide those issues on appeal. The Court affirmed the lower court's dismissal of his original claims. See also *Hurns v. Miss. Dept. of Corrections*, 878 So.2d 223, 226 (Miss. Ct. App. 2004) (the issue of reclassification of a prisoner's custody status had not been properly presented for

administrative relief or presented to the trial court and therefore was procedurally barred on appeal.)

Terry gives no justification for failing to raise this argument in the proper manner. This Court should decline to consider the gender discrimination claim on the basis that it was untimely raised.

- b) IN ANY EVENT, TERRY WAS DISCHARGED BECAUSE OF THE CRIMINAL CONVICTION—JUST BECAUSE “HE WORKED IN AN OFFICE FULL OF WOMEN” DOES NOT CONSTITUTE EVIDENCE THAT HIS GENDER WAS THE RATIONALE FOR HIS TERMINATION.

Terry leaps to the fantastic conclusion that he was discriminated against in violation of 42 U.S.C. 2000e-2 when he picks out one sentence from all the testimony of Medicaid’s witness, to conclude that he was terminated because he was a male. (Terry, a white man, makes no argument that he was discriminated against on grounds of race.) However, this one sentence—“he worked in an office full of women”—is taken out of context. In context, it is apparent that Ms. Shinard was giving a general description of Terry’s work environment. The fact that he worked in that environment was not stated to be any part of the reason for his termination. Rather, Terry was terminated for his criminal conviction of stalking and assault. These are not minor crimes or mere property offenses. They are crimes against the person. The Testimony is clear that he was terminated for a Group III, Section 10 offense, a criminal conviction for a felony or misdemeanor while employed. This fact is set out in the termination letter which is Exhibit “4”. Additionally, at the hearing, Rachel Shinard was asked at Record, Volume 3, page 11, lines 4-9, 17-22):

Q. What offense was Mr. Terry charged with?

A. A Group Three, Number 10.

Q. Can you recite, not verbatim, but what that is?

A. A criminal conviction for a felony or misdemeanor while employed with the state.

Q. What were the - - his convictions that the division found out about and used for this Group Three offense?

A. We had received a document that Mr. Terry was convicted of one count of simple assault and one count of stalking, if I recall correctly.

Later, in the Record, Vol. 3 at page 17, lines 1-9, Ms. Shinard's testimony is clear:

Q. Did the appellant's actions constitute a group offense under the State Personnel Board?

A. Yes.

Q. Will you tell the court what group offense that was?

A. It was a group three offense number 10, which is the criminal conviction for a felony or a misdemeanor while employed.

What is more, the testimony shows that the final decision to terminate Terry's employment was vetted through several layers of agency officials, including the following persons: Lou Cumberland, a Regional Director (Record, Vol. 3, p. 14, lines 20 and 21), Alex Dennery and Deputy Director Robert Moody are copied on the termination letter (Exhibit "4"), and Executive Director Warren A. Jones, M.D., made the final decision (Record, Vol. 3, page 18, lines 11 & 12 and Exhibit "4").

The decision to discharge Terry was fully within the discretion of Medicaid, and there is no evidence that his gender was a consideration in this termination or that he was subject to discrimination.

CONCLUSION

Dave Terry was convicted in Rankin County Court of simple assault and stalking. Medicaid had the right, pursuant to State Personnel Board policy, to terminate Terry on account of this conviction, and for that reason alone. Medicaid had ample and substantial evidence of this conviction. Indeed, Terry has not disproved that he was, in fact, convicted of these offenses, or that the underlying crimes were not committed by him. Terry's post-termination expungement of his conviction did not change the underlying facts, and Medicaid was not obligated to reinstate him on that account. Thus, Medicaid's termination was not arbitrary or capricious and was supported by substantial evidence.

Terry's due process rights were not violated in the EAB proceedings. Hearing Officer Daniels properly struck the witnesses of both parties pursuant to EAB procedural rules. Terry profited from this ruling by striking Medicaid's testimony, as well. He could have testified himself, but he did not. He did not provide any specific information to allow this Court or the Circuit Court below, to decide whether the exclusion of his witnesses affected his substantial rights. Instead, from the little that was proffered by Terry, it is clear that any error in excluding these witnesses was harmless.


Finally, Terry's belated charge of gender discrimination cannot be raised for the first time on appeal. Before the Hearing Officer, Terry disclaimed any allegation of gender or race discrimination. The raising of that claim here is both barred procedurally and is without merit on the record.

For all these reasons, the Division of Medicaid requests that this Court affirm the Order of the Circuit Court.

Respectfully submitted, this the 11th day of October, 2010.

MISSISSIPPI DIVISION OF MEDICAID,
Appellee

By: JIM HOOD, ATTORNEY GENERAL
STATE OF MISSISSIPPI

By: 
Charles P. Quarterman, MSBN [REDACTED]
Special Assistant Attorney General
Chief Counsel for the Division of Medicaid

Charles P. Quarterman
Special Assistant Attorney General
Nicole G. Litton
Special Assistant Attorney General
550 High Street, Suite 1000
Jackson, Mississippi 39201
Telephone: (601) 359-6814
Facsimile: (601) 359-9620

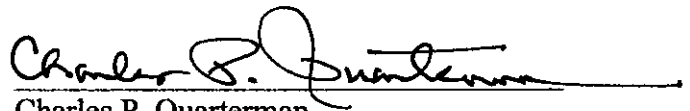
CERTIFICATE OF SERVICE

I, Charles P. Quarterman, Special Assistant Attorney General, Counsel for the Mississippi Division of Medicaid, do hereby certify that I have this day served a true and complete copy of the foregoing document, via U.S. mail, postage prepaid, to:

Hon. Tomie T. Green
Hinds County Circuit Court Judge
P.O. Box 327
Jackson, MS 39205

Christopher H. Neyland, Esq.
Neyland & Brewer, PLLC
188 E. Capitol Street, Suite 777
Jackson, MS 39201

This the 11th day of October, 2010.


Charles P. Quarterman